2006

State of Utah v. Jeffrey K. Johnson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. JEFFREY K. JOHNSON, Defendant/Appellant.	Case No. 20060602-CA Not Incarcerated

OPENING BRIEF OF APPELLANT ON INTERLOCUTORY APPEAL

This is the opening brief of appellant on appeal from interlocutory orders entered by the Honorable Stephen L. Henriod of the Third District Court of Salt Lake County, State of Utah.

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JURISDICTION

Utah Code Ann. § 78-2a-3(2)(d) provides this Court's jurisdiction over this interlocutory appeal from a court of record in a criminal case involving a third degree felony charge.

STATEMENT OF ISSUES

1. Did the district court err in denying Johnson's motion to quash the order binding Johnson over on a charge of threatening a judge, when the charge was premised on a private telephone conversation between Johnson and his divorce lawyer regarding Johnson's divorce, and in the absence of any proof that Johnson intended to influence a judge with this private conversation?

Standard of review: The trial court's ruling was directed at the elements of the offense (R. 229). The preliminary hearing involved no assessment of witness credibility,

because the State's case consisted of a tape-recorded telephone conversation and a written summary of a telephone conversation, which were presented by proffer of what the investigating officer would have testified to, had he been called (R. 31-32; R. 252: 9-11). Hence, this Court may address the trial court's legal reasoning, and the propriety of quashing the bindover order for correctness, and need not draw evidentiary inferences in the State's favor. See State v. Bradshaw, 2004 UT App 298, ¶ 8 n.3, 99 P.3d 359 (where prosecution did not call witnesses, but relied on stipulated facts, the prosecution was not entitled to inferences drawn in its favor on review of the bindover order), cert. granted, 109 P.3d 804 (Utah 2005).

The issue was raised and ruled on in the lower courts (R. 36-50, 55-60, 61-65, 99, 119-134, 162-170, 229; R. 253: 5-12).

2. Did the district court err in denying Johnson's motion in limine seeking to bar his divorce lawyer from testifying about his private conversation with her regarding his divorce?

Standard of review: The trial court's ruling turns on the interpretation of the attorney-client privilege (R. 224-228). Accordingly, this Court may review this question of law without deference, for correctness. See, e.g, State v. Pedockie, 2006 UT 28, ¶ 23, 137 P.3d 716.

The issue was raised and ruled on in the lower court (R. 147-159, 218-222, 224-228; R. 253: 12-23).

STATUTE AND RULE

Utah Code Ann. § 76-8-316 and Utah Rule of Evidence 504 are copied in the addendum.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

The State charged Johnson in Sixth District Court with two counts of threatening a judge, a third degree felony, in violation of Utah Code Ann. § 78-8-316 (R. 6-7).

At the preliminary hearing, the first count was premised on a written statement of Johnson's divorce attorney regarding a telephone conversation between her and Johnson on September 13, 2005, and the second count was premised on a tape recording of a telephone conversation between her and Johnson on September 16, 2005 (R. 31-32, 252: 9-11).

Following the preliminary hearing, Magistrate Wallace A. Lee dismissed the first count for insufficient evidence, but bound over on the second count (R. 61-63, 99). He transferred jurisdiction to Salt Lake County pursuant to a motion by defense counsel, because at the time of the telephone calls, Johnson was in the state of New Mexico, and his divorce lawyer was in Salt Lake County (R. 64-65).

The State then charged Johnson in Salt Lake County, again alleging two counts of retaliating against a judge (R. 135-36), and moved to amend the information to premise two counts against two judges on one date, September 16, 2005 (R. 143-45).

Johnson opposed amendment of the information and moved to quash the bindover order (R. 36-50, 55-60, 61-65, 99, 119-134, 162-170; R. 253: 5-12). Judge Henriod has yet to rule on the amendment of the information, but denied Johnson's motion to quash in an order copied in the addendum, which states, in relevant part:

> Whether or not Fixel adds an element to 78-8-316(1) which is not in the statute the issue raised is a question for the jury.

[Sic] (R. 229).

Johnson filed a motion in limine invoking the attorney-client privilege to prevent Johnson's divorce lawyer from testifying regarding their conversation (R. 147-159, 218-222, 224-228; R. 253: 12-23). Judge Henriod denied the motion in a memorandum decision which is in the addendum to this brief (R. 224-228).

This Court granted Johnson's petition for interlocutory appeal from the trial court's orders denying the motion to quash and the motion in limine. See Order dated August 4, 2006.

STATEMENT OF FACTS

On September 16, 2005, Johnson's divorce lawyer, Joy Jelte, called Johnson and surreptitiously recorded the ensuing conversation (R. 253: 17, 64-65). This call concerned Johnson's pending divorce, and there was no evidence that Johnson expected or intended for his lawyer to record or share the substance of this call with anyone (R. 254: 2-24). The conversation was initiated by the attorney, who wished to lead Johnson

to repeat statements he had made in an earlier conversation so she could record them, unbeknownst to her client (R. 253: 16-18). She began the conversation by inquiring about Johnson's checklist, and he responded by inquiring about the protective order, his alimony, and his 401K (R. 254: 2-4). They discussed his child support and visitation, the property division, the protective order, whether he would exercise his right to appeal, whether he could afford to pay attorney fees for an appeal, the potential for reconciliation with his wife, the proper attorney's fees for her lawyer, whether the lawyers and judges in his case were following the law, whether there was perjury, ex parte contact with a judge or unethical conduct involved in his case, how justice should be administered, and what the potential consequences would be to him if he hurt someone (R. 254: 4-23). The majority of the conversation was interspersed with his heated expressions of frustration with the judges and two lawyers who had been involved in the case (R. 254: 1-24). His most imminent threat was to come to court in a T-shirt and Levis (R. 254: 23). When Jelte told him to leave his guns home, he told her that he and his crew dealt with matters of life and death every day and that he was not stupid (R. 254: 23). He told her he would play by the same rules as the judges and lawyers (R. 254: 23), and that the day would come when there would be justice, but that it would not be for a while (R. 254: 21). The conversation ended with him remarking that he did not have anything planned in the near future (R: 254: 24).

A full discussion of Johnson's statements which may fairly be interpreted as

threats, and the absence of evidence to suggest that he intended for his statements to reach or influence a judge is discussed in Point I of the Argument section of the brief.

While the tape of the conversation is apparently incomplete (R. 254: 9, 13, 24), the entire transcript of the tape is in the addendum to this brief.

SUMMARY OF ARGUMENTS

The offense of threatening a judge requires proof of intent to influence a judge with a threat. The telephone conversation wherein Johnson made the alleged threats was a private one between him and his attorney. Because there is no evidence that he intended this confidential conversation to be shared with anyone, let alone for anything he said during this conversation to influence a judge, the evidence did not support a reasonable belief that Johnson harbored the requisite *mens rea* to sustain the charge of threatening a judge. Because the State failed to present credible evidence of this key element of the offense at the preliminary hearing, the trial court should have granted Johnson's motion to quash the bindover order.

Assuming *arguendo* that the case proceeds to trial, this Court should hold that Jelte may not testify regarding her conversation with Johnson, because Johnson's intention in participating in the conversation was "for the purpose of facilitating the rendition of professional legal services" to himself, and is thus the conversation is privileged under Utah Rule of Evidence 504.

ARGUMENTS

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING JOHNSON'S MOTION TO QUASH THE BINDOVER ORDER.

While magistrates issuing bindover orders are traditionally afforded some deference, in part because of their advantaged position in assessing the credibility of witnesses who appear before them, e.g., Virgin, 2006 UT 29 at ¶¶ 28-34,[1] in the instant matter, the State's case at the preliminary hearing consisted of the taped phone conversation transcribed in the addendum to this brief (R. 31-32; R. 252: 9-11). Hence, this Court may review the magistrate's bindover order and address the trial court's legal reasoning in denying the motion to quash for correctness, and need not draw evidentiary inferences in the State's favor. See State v. Bradshaw, 2004 UT App 298, ¶ 8 n.3, 99 P.3d 359 (where prosecution did not call witnesses, but relied on stipulated facts, the prosecution was not entitled to inferences drawn in its favor on review of the bindover order), cert. granted, 109 P.3d 804 (Utah 2005).

A bindover order must be supported by credible evidence of each element of the offense. E.g., State v. Virgin, 2006 UT 29, ¶ 20, 137 P.3d 787. In order for preliminary hearings to serve their essential function of "ferreting out groundless prosecutions,"

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[1]This portion of the Virgin opinion discusses a four factor test for choosing appellate standards of review. See id. The Utah Supreme Court recently revised the four factor test, and thus modified this aspect of Virgin, but still recognizes the ability of a judge to observe witnesses and assess their credibility as a basis for deference. See State v. Levin, 2006 UT 50, ¶¶ 25-31, 2006 WL 2578197.

bindover orders may not be premised on speculation, but must be founded on evidence supporting a reasonable belief that the defendant committed each element of the crime charged. Id. at ¶¶ 20, 21.

A. THE OFFENSE OF THREATENING A JUDGE REQUIRES PROOF OF INTENT TO INFLUENCE A JUDGE WITH THE THREAT.

It is elementary that criminal offenses require the joint operation of act and intent, and that absent proof of *mens rea* with regard to each element of an offense, there is normally no crime proved, unless the offense at issue involves well-defined strict liability See, e.g., State v. Elton, 680 P.2d 727, 728 (Utah 1984). See also Utah Code Ann. § 76-2-101 (1) ("A person is not guilty of an offense unless the person's conduct is prohibited by law; and the person acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires; or the person's acts constitute an offense involving strict liability.").

The offense at issue here is defined by Utah Code Ann. § 76-8-316 as follows:

> (1) A person is guilty of a third degree felony if the person threatens to assault, kidnap, or murder a judge or a member of the Board of Pardons and Parole with the intent to impede, intimidate, or interfere with the judge or member of the board while engaged in the performance of the judge's or member's official duties or with the intent to retaliate against the judge or member on account of the performance of those official duties.
> ....

The gravamen of the third degree felony offense with which Johnson stands charged is making the threat (the *actus reus*) with the specific intent to impede,

intimidate, or interfere with the judge while engaged in the performance of the judge's official duties, or with the specific intent to retaliate against the judge on account of the performance of those official duties (the *mens rea*). See Utah Code Ann. § 76-8-316(1), *supra*. This is reflected in the plain language of subsection (1),[2] and is confirmed by reviewing subsections (2) and (3),[3] which define other crimes with the same *mens rea*, but different *actus reuses*. See id.[4]

If there is no foreseeable way that the threat would be communicated to the judge, the requisite intent for the third degree felony of threatening a judge is lacking, because a

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[2]Out of deference to the Legislature's lawmaking domain, courts routinely interpret statutes in accordance with their plain language. See, e.g., State v. Rivera, 933 P.2d 1344, 1345 (Utah 1977).

[3]In interpreting a statute, it is appropriate for the Court to view the statute as a whole, to insure that the objective of the statute is properly ascertained, and that the separate provisions are interpreted harmoniously. See, e.g., Sentry Investigations Inc. v. Davis, 841 P.2d 732, 734 (Utah App. 1992).

[4]Subsections (2) and (3) provide:

....

(2) A person is guilty of a second degree felony if the person commits an assault on a judge or a member of the Board of Pardons and Parole with the intent to impede, intimidate, or interfere with the judge or member of the board while engaged in the performance of the judge's or member's official duties, or with the intent to retaliate against the judge or member on account of the performance of those official duties.

(3) A person is guilty of a first degree felony if the person commits aggravated assault or attempted murder on a judge or a member of the Board of Pardons and Parole with the purpose to impede, intimidate, or interfere with the judge or member of the board while engaged in the performance of the judge's or member's official duties or with the purpose to retaliate against the judge or member on account of the performance of those official duties.

person cannot utter a threat with the intent or expectation that the threat will influence or punish the judge if there is no foreseeable way for the judge to learn of the threat. See State v. Fixel, 945 P.2d 149 (Utah App. 1997).

In Fixel, the defendant appeared in the Fourth District Court for a bail hearing. He was seated in the jury box awaiting his return to jail and was apparently upset about the bail determination. As the defendant was being lead to a transport vehicle, he stood immediately behind an officer and loudly stated, "When I get out the judge is dead." His voice could be heard up to fifteen feet away. The officer thereafter informed the court of the threat. See id. at 150. In appealing from his conviction for threatening a judge, the defendant alleged prosecutorial misconduct for the prosecutor's argument that he did not have to prove that Fixel intended to kill the judge, but only had to prove that Fixel uttered the threat with the intent to retaliate. Id.

This Court began by recognizing that the charging statute "makes it a crime to threaten a judge with the intent to interfere with the performance of a judge's official duties or the intent to retaliate against the judge for the performance of official duties." 945 P.2d at 151. This Court rejected Fixel's contention that the charging statute required proof of intent to carry out the threat, because the statute contained no language indicating that intent to carry out the assault, kidnaping or murder or to take action "in that general direction" was essential to the crime. 945 P.2d at 151-52. The Court found that Fixel's utterance of the threat within the earshot of the bailiff was sufficient proof of

his intent to influence the judge, and that the evidence thus sustained his conviction and supported the prosecutor's argument, because it was indeed irrelevant whether Fixel truly intended to kill the judge. The Court explained:

> As indicated, whether Fixel "really" had the intention to do any such thing, or whether he made the threat knowing he would never lift a finger against the judge, is irrelevant under the statute. The jury was free to infer that when Fixel uttered his threat, he fully expected it would be conveyed to the judge, as it in fact was, and intended that it would intimidate the judge in the course of his duties, perhaps prompting some more favorable treatment when Fixel next appeared before him, or, as actually happened, prompting the judge to withdraw from cases involving Fixel.
>
> Alternatively, the jury could infer that Fixel uttered the threat, expecting it would be passed along to the judge, intending "to retaliate against the judge" for how he had performed his duties vis-a-vis Fixel. In this regard, "to retaliate" does not connote some retributive physical violence. Rather, it contemplates the simple concept of "pay back." *See Webster's Third New International Dictionary* 1938 (1986) (defining retaliate to mean "to return the like for; repay or requite in kind" and "to return like for like"). The judge, by his action, had upset Fixel. By threatening the judge, Fixel could perhaps upset him as well, thereby fully accomplishing the "pay back" that is the essence of retaliation.

Id at 152 (footnotes omitted).

The conclusion of the Fixel Court in requiring an expectation that the judge would learn of the threat is sound. One cannot intend to influence a judge (whether by impeding, intimidating or paying him or her back) with a threat that the person does not intend the judge to learn of. See id. See also United States v. Fenton, 30 F.Supp.2d 520, 527-28 (W.D. Pa. 1988) (reversing conviction under 18 U.S.C.A. § 115, the federal statute the Fixel Court recognized as parallel to Utah Code Ann. § 76-8-316, because the

defendant told an insurance adjuster that he was going to kill a congressman, when there was no evidence that the insurance agent would convey the remark to the congressman, and thus there was no proof of intent to impede, interfere with, intimidate or retaliate against congressman in the course of his official duties). See also State v. Lucero, 2002 UT App 135, ¶ 11 n.1, 47 P.3d 107 (in refusing to address a claim of insufficient evidence to sustain a conviction for threatening a public official, the Court noted the appellant's failure to cite Fixel, which the Court cited for the parenthetical proposition, "holding mere utterance of a threat, without specified intent, could not satisfy Utah Code Ann. § 76-8-316 (1999).").

B. THERE WAS INSUFFICIENT EVIDENCE THAT JOHNSON HARBORED THE REQUISITE INTENT TO INFLUENCE A JUDGE WITH HIS STATEMENTS.

In the instant matter, the State presented no evidence that Johnson uttered any remark with the intent that the remark would reach or influence any judge in any way. Rather, the State only proved various inflammatory statements made by an angry client to his lawyer in the course of discussing the subject matter of the legal representation – the divorce case. Because there was no evidence that Johnson uttered any threat with the requisite intent to influence any judge, the trial court should have quashed the bindover order. See Fixel and Virgin, *supra*.

While it does not appear legally necessary to do so, Johnson will marshal the evidence which supports the issuance of the bindover for threatening a judge, which

requires proof of a threat to assault, kidnap or murder a judge made with the intent to impede, intimidate or interfere with a judge's performance of his official duties, or with the intent to retaliate against a judge on account of the judge's performance of his official duties. See generally Utah Code Ann. § 76-8-316 and State v. Fixel, 945 P.2d 149, (Utah App. 1997), discussed further *infra*.

Johnson does not contest the sufficiency of the evidence to establish probable cause that he made requisite threatening statements regarding judges in Sevier County. The following statements could support such a finding:

> [H]e's going to have what's coming to him.
>
> ....
>
> All of the Mowers – yeah[.]

(R. 254: 6).

> I've seen firsthand the corruption in Severe County, and you know what? I'm not going to take it no more. After one, the rest are free.
>
> ...
>
> After one, the rest are free.

(R. 254: 9).

> I've had it. It's injust, it's corrupt, and you know what? The legal system is so injust and corrupt, that I'm going to take care of it by myself. That's all there is to it.

(R. 254: 10).

Only after I take a bunch of people with me. I'm not going to go by myself. I can guarantee it.

(R. 254: 10).

And you know what? If 20 years ago, if 5 years ago, if 10 years ago men would stand up and say, "You know what? I'm tired of being screwed by Utah," and take action on their own, maybe somebody would say, "You know what? Maybe this isn't right. We're getting Judges knocked off left and right. Maybe this isn't right."

(R. 254: 11).

The only problem is, I don't care. If I can get four or five people in Sanpete and Sevier County and they take me out, it's a better world, isn't it?

....

(R. 254: 12).

You know what? I told my buddy about it. I've got a pretty close friend, and he told me – he said, "You know what, you're not going to get caught, but you're going to go to hell." It's worth it.

(R. 254: 13).

He's telling me I'm going to hell; but it's a damn good plan, so you know what?

(R. 254: 14).

Go out with a bang.

(R. 254: 17).

> Because the time they catch up with me, after one, the rest are free. Yep, I'll make my mark.

(R. 254: 17).

> Well you know what? You know what? At the end of the day, the people that are doing the same thing, they won't do it no more.

(R. 254: 19).

> If I can get four or five and they catch me, so what? I'm still ahead.

(R. 254: 21).

> The day will come, and it won't be for awhile. The day will come there will be justice, and the world will be a better place.

(R. 254: 21).

> But all that said, you know what? If I leave it alone, things are just going to go on as usual. It's just going to keep happening to somebody else. Judges refuse to follow the law, and attorney – yet. You know what? It's got to end sometime.

(R. 254: 23-24).

There is no evidence to marshal in support of the element that Johnson bore the requisite intent to influence any judge with the vituperative statements he made to his lawyer, or that he expected any judge to learn of his statements. He did not instruct his lawyer to convey any threats to the judges or to anyone else, and she did not indicate that

such threats would be conveyed.

Jelte asked him what Judge Mower would have to do (apparently referring to what the judge should do to be just), and Johnson replied that Mower would have to make up for granting the protective order to his wife and permitting her to take everything but his shaving equipment and his steel (R. 254: 15). Jelte asked what Judge Lyman would have to do, Johnson indicated that if his wife's lawyer reimbursed him $150,000, then Lyman and Johnson would be even (R. 254: 16). When Johnson indicated that he did not think that would happen and Jelte confirmed that it would not, he reiterated that it would not happen, and remarked "So there's just life, liberty and justice for all." (R. 254: 16). In this conversation, Johnson merely answered his lawyer's vague questions apparently asking him what the judges would have to do to be just in his opinion. Nothing in this conversation is fairly read as an intimation that his lawyer should or would inform the judges of any threats by Johnson.

When his lawyer asked him whom he had been discussing his plans with, he declined to say, stating, "Nobody. Nobody else needs to be in this." (R. 254: 14). When she asked details about what he was planning to do, he said he did not think he would tell her, because it would not benefit her and would not benefit him if he told (R. 254: 15).

In sum, the conversation is properly viewed as a private conversation between Johnson and his divorce lawyer concerning his profound anger and frustration with the litigation of his divorce. While various of his statements are fairly read as threats to

assault or kill judges, there is no evidence that he intended his statements to reach or influence any judge.

C. THE TRIAL COURT'S LEGAL ANALYSIS WAS INCORRECT.

Judge Henriod's ruling on the motion to quash, that the elements of the offense as defined by Fixel were for the jury to determine (R. 229), is legally incorrect in two ways. First, district court judges have jurisdiction and are required to review bindover orders from magistrates, to determine whether their jurisdiction, which is premised on a proper bindover from a preliminary hearing, is sound. See, e.g., State v. Humphrey, 823 P.2d 464, 466 (Utah 1991). The matter cannot be left for a jury's determination, for our courts generally hold that any deficiency in preliminary hearings is rendered moot by the full panoply of procedural rights afforded to a criminal defendant in a jury trial. See id. at 467 n.6. Second, it is one of the most elementary duties of a trial court to define the elements of crimes for juries in proper jury instructions. See, e.g., State v. Laine, 618 P.2d 33, 35 (Utah 1980) (absence of accurate jury instruction on the elements of the offense constitutes structural error).

This Court should reverse the trial court's order and require the bindover order quashed. See Fixel, Virgin, *supra*.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING JOHNSON'S MOTION IN LIMINE TO PREVENT JOHNSON'S ATTORNEY FROM TESTIFYING ABOUT THE CONTENTS OF THEIR CONVERSATION REGARDING HIS PENDING DIVORCE.

The trial court's denial of the motion in limine seeking to bar Joy Jelte from testifying about her telephone conversation with Johnson was premised on the theory that his statements against the trial judges in his divorce were not necessary to Jelte's rendition of legal services, and thus were not covered by the attorney-client privilege (R. 224-227). Given that the ruling turns on the court's interpretation of the attorney-client privilege, a brief overview of the relevant law is in order.

The attorney-client privilege "is intended to encourage candor between attorney and client and promote the best possible representation of the client." Gold Standard, Inc. v. American Barrick Resources (USA), Inc., 801 P.2d 909, 911 (Utah 1990). "It is the oldest of the common law privileges protecting confidential communications." Doe v. Maret, 984 P.2d 980 (Utah 1999). The privilege is contained in Utah Rule of Evidence 504 and is codified by Utah Code Ann. § 78-24-8(2), although the rule is generally read as supplanting the statute. See, e.g., Spratley v. State Farm Mut. Auto Ins. Co., 2003 UT 39, ¶ 20 n.3, 78 P.3d 603. Utah Rule of Professional Conduct 1.6 provides clients with parallel protection with regard to their lawyers' duty to maintain confidentiality,[5] but the

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[5]The rule provides, in relevant part:
(a) A lawyer shall not reveal information relating to the representation of a

ethical rules and the privilege are not coextensive, and thus, Rule 1.6, governing ethically conduct of a lawyer, does not control the admissibility of the lawyer's testimony in court, which is governed by Rule 504. Cf. Spratley v. State Farm Mut. Auto Ins. Co., 2003 UT 39, ¶ 14 n.2, 78 P.3d 603. See also, e.g., Purcell v. District Attorney, 676 N.E.2d 436 (Mass. 1997); *infra*.

Utah Rule of Evidence 504 provides:

> ....
>
> **(b) General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, in any combination.

> client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
> **(b)** A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (b)(1) to prevent reasonably certain death or substantial bodily harm;
> ...

Rule 1.6 did not permit Jelte to make the disclosures she did in this case because Johnson stated that he would not return to Richfield before the next hearing but that he would be present for that hearing. He also stated clearly at the end of the conversation that nothing would happen in the near future. Under these circumstances, especially where Johnson was located in New Mexico, any threatened harm was not reasonably certain to occur and the disclosure was not permitted by Rule 1.6. Therefore, even if Rule 1.6 governed the admissibility and not just the disclosure of confidential statements, the statements would be inadmissible nonetheless. Utah R. Prof. Cond. 1.6.

> **(c) Who May Claim the Privilege.** The privilege may be claimed by the client . . .
>
> **(d) Exceptions.** No privilege exists under this rule:
>
> (1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud[.]

This Court may confirm the inadmissibility of Jelte's testimony under the rule of evidence by reviewing Purcell, *supra*. In that case, a recently evicted tenant contacted an attorney, Purcell, and indicated that he would burn down his former apartment building. After much deliberation, the attorney informed the police and was later subpoenaed to testify at trial. The Massachusetts Supreme Court examined rules substantially similar to those in Utah and determined that the initial disclosure was not unethical. However, "[t]he fact that the disciplinary code permitted Purcell to make the disclosure tells us nothing about the admissibility of the information that Purcell disclosed." Purcell, 676 N.E.2d at 438. The court ultimately held that, although ethically disclosed, the communication was not admissible at trial. The court reasoned that while the harm the client may have caused could be ameliorated by the lawyer's reporting the client's criminal intentions, the policy interests behind the attorney-client privilege did not permit the admission of the lawyer's testimony in court. The court recognized that if the privilege were broadened to vitiate the privilege when the crime-fraud exception truly did

not apply, lawyers might be less likely to report at all, in order to avoid adverse consequences to their clients, or might be inclined to warn their clients that such discussions may not be privileged, and thereby chill the clients' seeking of legal advice and deprive the lawyers of the opportunities to inform their clients of the governing law and to dissuade the clients from breaking it. Id. at 440-41.

Other courts, like the Purcell court, recognize that the crime-fraud exception to the attorney-client privilege does not apply merely because a lawyer learns of a crime or fraud during the course of representation, but instead requires proof that the client was actually seeking the lawyer's aid in committing an offense. See, e.g., In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir.1995) ("the crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud[;]" to invoke exception, there must be proof that legal communications were in furtherance of crime).

In the instant case, the substance of the conversation and recording are not admissible under Rule 504 of the Utah Rules of Evidence. There is nothing in the Johnson-Jelte conversation intimating that Johnson was seeking Jelte's assistance in committing any crime, and thus the crime-fraud exception does not apply. See, e.g., Purcell, *supra*. The Advisory Committee Notes following Rule 504 state, "The client is entitled not only to refuse to disclose the confidential communication, but also to prevent disclosure by the lawyer or others who were involved in the conference or

learned, without the knowledge of the client, the content of the confidential communication." Here, the State learned of the confidential information "without the knowledge of the client." Therefore, where none of the exceptions to the rule are applicable, Johnson is entitled to prevent the privileged information from being disclosed to the jury. See id.

Johnson's statements were made in the course of a telephone conversation between him and his divorce lawyer concerning the pending divorce. In the course of this discussion, his lawyer was giving him legal advice concerning legitimate details in his divorce, the potential ramifications of his actions, and the advisability of attending court and letting the process address his concerns (R. 254 at 2-24). The telephone conversation was initiated by the lawyer, ostensibly to discuss the pending divorce, but truthfully to set up the client to make inflammatory statements on tape (R. 253: 16-18). If this Court were to condone the trial court's ruling, parsing out statements threatening judges involved in the divorce at issue from the remainder of the legal conversation, this would undoubtedly undermine the policy interest to be served by the privilege – to encourage those seeking legal advice to provide all relevant information to their lawyers in order to obtain the best possible representation and comply with the law. See, e.g., Gold Standard, Inc. v. American Barrick Resources (USA), Inc., 801 P.2d 909, 911 (Utah 1990), *supra*.

In denying the motion in limine, the trial court chose to rely on Aviles v. State, 165

S.W.3d 437 (Tex. App. 2005), a case which is readily distinguished, because there, the client was not even speaking with his lawyer, but was listening to a court interpreter's summary of what the lawyer wanted the client to know and then informed the interpreter outside the hearing of his lawyer that when he got out, he was going to kill the prosecutor. The court understandably held that this threat was not made in an effort to obtain legal advice. Id. at 438-39.

The other case Judge Henriod relied on in denying the motion in limine, Hodgson Russ, LLP v. Trube, 867 So.2d 1246 (Fla. Dist. Ct. App. 2004), is similarly distinguished by the facts upon which the court's holding turned. There, the court held that a brother's statement to his lawyer that he would kill his sister to end the dispute over their mother's estate was not privileged as necessary to obtaining informed legal advice, because the statement was made at the end of a legal conference, as he was walking out of the office. Id. at 1247.

In contrast, Johnson's statements at issue here were made intermittently in the course of a protracted discussion of his protracted divorce. The conversation here was initiated by the attorney, who wished to lead Johnson to repeat statements he had made in an earlier conversation so she could record them (R. 253: 16-18). She began the conversation by inquiring about the client's checklist, and he responded by inquiring about the protective order, his alimony, and his 401K (R. 254: 2-4). They discussed his child support and visitation, the property division, the protective order, whether he would

exercise his right to appeal, whether he could afford to pay attorney fees for an appeal, potential for reconciliation with his wife, the proper attorney's fees for her lawyer, whether the lawyers and judges in his case were following the law, whether there was perjury, ex parte contact with a judge or unethical conduct involved in his case, how justice should be administered, and what the potential consequences were to him if he hurt someone (R. 254: 4-23). While he did repeatedly and heatedly express frustration with the judges, two lawyers, and the functioning of the judicial system, his most imminent threat was to come to court in a T-shirt and Levis (R. 254: 23). When Jelte told him to leave his guns home, he told her that he and his crew dealt with matters of life and death every day and he was not stupid (R. 254: 23). The conversation ended with him remarking that he did not have anything planned in the near future (R: 254: 24).

On these facts, it is fairly concluded that Johnson's participation in this conversation with his lawyer about his pending divorce and the upcoming hearing was "for the purpose of facilitating the rendition of professional legal services" to himself. Accordingly, it is privileged under Utah Rule of Evidence 504. See Purcell, *supra*. Compare Aviles and Hodson Russ, *supra*.

CONCLUSION

This Court should reverse the trial court's orders denying the motion to quash the bindover order and denying the motion in limine.

Respectfully submitted this 8 day of November, 2006.

YENGICH, RICH & XAIZ
Attorneys for Appellant

By: Earl Xaiz
EARL XAIZ

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, first class postage pre-paid, to Assistant Attorney General Kris Leonard, 160 East 300 South, 5th Floor, P.O. Box 140858, Salt Lake City, Utah 84114-0858, this 7 day of November, 2006.

ADDENDUM

TRIAL COURT'S ORDER DENYING
MOTION TO QUASH THE BINDOVER ORDER

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MOTION TO QUASH
vs.	:	Case No: 051909162
JEFFERY K JOHNSON, Defendant.	:	Judge: STEPHEN L HENRIOD Date: 06/26/2006

Clerk: lynm

The Defendant's Motion to Quash has been reviewed by the court and is denied. Whether or not Fixel adds an element to 78-8-316 (1) which is not in the statute the issue raised is a question for the jury.

Judge STEPHEN L HENRIOD

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 051909162 by the method and on the date specified.

METHOD	NAME
Mail	STATE OF UTAH PLAINTIFF , UT
Mail	EARL G XAIZ ATTORNEY DEF 175 E 400 S STE 400 SALT LAKE CITY UT 84111-2314

Dated this 24 day of June, 2004.

Deputy Court Clerk

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TRIAL COURT'S MEMORANDUM DECISION
DENYING MOTION IN LIMINE

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

STATE OF UTAH,	:	MEMORANDUM DECISION
	:	
Plaintiff,	:	Case No. 051909162
	:	
v.	:	Judge Stephen L. Henriod
	:	
JEFFERY K. JOHNSON,	:	Date: June 14, 2006
	:	
Defendant.	:	

This matter is before the Court on Defendant's Motion in Limine. Having considered the memoranda submitted by the parties, the Court enters the following decision and finds that Defendant's Motion should be **DENIED.**

At issue here is whether an attorney is allowed to testify against a former client regarding threats the client allegedly made against a number of judges and conveyed to his attorney. Defendant concedes that Utah Rule of Professional Conduct 1.6(b)(1)[1] allowed his attorney to report Defendant's alleged statement to law enforcement authorities in order to prevent Defendant from acting on the threats. However, Defendant argues that his alleged statements are still privileged and so his attorney cannot testify regarding them in Defendant's criminal prosecution. The State disagrees and argues that Defendant's statements were not privileged and, therefore, his attorney is allowed to disclose the statements during these criminal proceedings.

The Court recognizes that this issue is one of first impression here in Utah. Additionally, there appears to be a split among the other limited jurisdictions that have addressed this issue. Therefore, the Court does not undertake this decision lightly. However, the Court finds that Defendant's statements were not privileged and Defendant's former attorney may testify against Defendant at his trial.

It is clear that *only* "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys [in order to obtain fully informed legal advice.]" *Fisher v. U.S.*, 425 U.S. 391, 403 (1976) (internal citations omitted).

[1]Rule 1.6(b)(1) of the Rules of Professional Conduct provides:
(b) A lawyers may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1)(b) to prevent reasonably certain death or substantial bodily harm.

achieve its purpose. Accordingly it protects only those disclosures - necessary to obtain informed legal advice - which might not have been made absent the privilege." *Id.*

Courts seem to have split on how to apply the attorney-client privilege in circumstances such as these, where a client allegedly makes threats regarding other individuals to his/her attorney. The Court, however, is persuaded by *Aviles v. State*, 165 S.W.2d 437 (Tex. Ct. App. 2005) and *Hodgson Russ, LLP v. Trube*, 867 So.2d 1246 (Fla. Dist. Ct. App. 2004).

In *Aviles*, the court held that when client conveyed a threat to an interpreter, who conveyed the threat to the client's attorney, that communication was not privileged because it "was not made for the rendition of professional legal services and [was] therefore not covered by the attorney-client privilege." 165 S.W.2d at 439. Defendant argues that this case is distinguishable because the threat was made to an interpreter and not to the attorney. However, *Aviles* does seem applicable because the court found that it was not determinative whether the interpreter was a representative of the attorney because the information could not be privileged. *Id.* The court stated "Appellant's communication of a threat to kill his court-appointed interpreter can in no way be considered necessary to the rendition of legal services for his pending burglary trial. We hold that this communication of an intent to commit a crime is not covered by the attorney-client privilege, rendering irrelevant the role the interpreter may have been serving at the time of the communication." *Id.*

Similarly, in *Hodgson Russ*, the court found that it was proper to admit an attorney's testimony against his client because "the threat [made by the client] was extraneous and was not a communication incident or necessary to obtaining legal advice." 867 So.2d at 1248.

Defendant relies primarily on *Purcell v. District Attorney*, 676 N.E.2d 436 (Mass. 1997). In *Purcell*, Mr. Tyree had gone to an attorney, Mr. Purcell, to discuss an employment matter. During the course of those discussions, Tyree made threats to burn down the apartment building where he had been employed. *Id.* at 437-38. Purcell considered these threats credible and reported them to the police. *Id.* at 438. After Tyree was indicted for attempted arson, the district attorney subpoenaed Purcell to testify. Purcell moved to quash the subpoena and that issue went up on appeal. *Id.* On appeal, the court found that there was no question regarding the ethical propriety of Purcell's disclosure of the threats to the police but that there was an issue regarding whether Purcell could testify at Tyree's arson trial. The court stated that the "attorney-client privilege applies only when the client's communication was for the purpose of facilitating the rendition of legal services. . . . A statement of an intention to commit a crime

made in the course of seeking legal advice is protected by the privilege, unless the crime-fraud exception applies. That exception applies only if the client or prospective client seeks advice or assistance in furtherance of criminal conduct." *Id.* at 115. The court went on to find that Tyree's communication to Purcell was privileged, saying, "Unless the crime-fraud exception applies, the attorney-client privilege should apply to communications concerning possible future, as well as past, criminal conduct, because an informed lawyer may be able to dissuade the client from improper future conduct and, if not, under the ethical rules may elect in the public interest to make a limited disclosure of the client's threatened conduct." *Id.* at 116.

Defendant also relies on *Kleinfeld v. State*, 568 So.2d 937 (Fla. Dist. Ct. App. 1990), which held that it was error to require an attorney to testify about his client's statement: "They [the police] know I did [murdered] Eric. I've got nothing to lose by doing you and then turning the gun on myself" because the statement was privileged. *Id.* at 939-40. However, *Kleinfeld* was later distinguished in Florida by *Hodgson Russ,* which stated that *Kleinfeld* applied only to cases where a privileged communication was admitted to prove an admission to a previous crime. 867 So.2d at 1248. It did not apply when the attorney's testimony would be admitted to prove that the client intended to commit a future murder. *Id.*

The Court finds *Aviles* and *Hodgson Russ* more persuasive than *Purcell* for a number of reasons. First, *Aviles* seems more in line with Utah's current recognition of attorney-client privilege. Specifically, in *Jackson v. Kennecott Copper Corp.*, 27 Utah 2d 310, 315, 495 P.2d 1254 (1972), the court, citing to *U.S. v. United Shoe Machinery*, 89 F.Supp. 357 (D. Mass. 1950), said that a party asserting privilege has the burden of showing that the communication between attorney and client was "for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding." Additionally, Utah Rule of Evidence 504(a)(6) provides: "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom the disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Subsection (b) of Rule 504 goes on to say: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers . . . ." It is clear that Utah holds that not everything a person says to his attorney is necessarily privileged. A person can make statements to his attorney which are not privileged because they are not made for the purpose of facilitating legal services. In the present case, Defendant did not make the threats to his attorney for the "purpose of facilitating the rendition of professional legal services." He did not seek legal advice, an opinion

regarding his potential actions, etc.[2] While Defendant was represented by counsel when he made the alleged threats, his threats did not at all relate to counsel's representation of him. Therefore, the statements seem to fall under *Jackson*, et. al., which would exclude them from privilege.

Second, *Aviles/Hodgson Russ* are the most recent efforts of courts to resolve this issue and seem to represent a growing trend in favor of finding threats unprotected by attorney/client privilege.

Finally, *Aviles/Hodgson* represent a more compelling policy interest than *Purcell*. *Purcell* argues that, in order to protect the attorney/client privilege, all statements made to attorneys must be afforded protections that they would not ordinarily be afforded. *Aviles/Hodgson* recognize that attorney/client privilege can be adequately protected by affording maximum protection to statements that are made in the context of the attorney/client relations, i.e., statements that are made to facilitate legal services. However, statements that are not made to facilitate legal services are not properly protected under attorney/client privilege. This services the interest of the attorney/client privilege while still supporting other important policy considerations such as facilitating prosecution of criminal behavior.

For the foregoing reasons, the Court finds that Defendant's Motion in Limine should be DENIED because the attorney-client privilege does not bar Ms. Jelte from testifying at Defendant's trial.

SO ORDERED this 13 day of June, 2006.

Judge Stephen L. Henriod
District Court Judge

[2] Strangely, if Defendant had sought legal advice in order to further his alleged intended crimes, his statements would not be privileged according to *Purcell*. This could lead to the odd result that statements made in furtherance of receiving advice would not be protected, while statements not made in furtherance of receiving advice would be protected.

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, on this 14 day of June, 2006.

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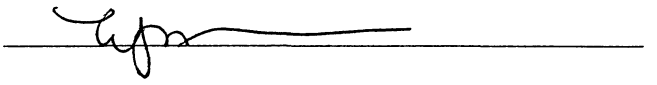


TRANSCRIPT OF TELEPHONE CONVERSATION BETWEEN JEFFERY JOHNSON AND JOY JELTE

06-000-ca

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

JEFFREY K. JOHNSON,

Defendant.

Case No. 051909162

ORIGINAL

Telephone Conversation
between Jeffrey Johnson and Joy Jelte
Electronically Recorded on
(No date provided)

Transcribed by: Beverly Lowe, CSR/CCT

1909 South Washington Avenue
Provo, Utah 84606
Telephone: (801) 377-0027

20060602-CA

PROCEEDINGS

(Electronically recorded on unknown date)

(Phone number dialed and ringing)

MR. JOHNSON: Hello?

MS. JELTE: Hi. Jeff, this is Joy Jelte. I didn't --

MR. JOHNSON: How are you?

MS. JELTE: I almost expected to get your answering machine. I just got the transcript from the court reporter for the hearing on Monday, but I don't have your checklist. I thought you were going to fax something to me.

MR. JOHNSON: I really just don't have a fax -- the only questions I have is how come the Judge never addressed Neeley about the protective order. It's not addressed in it.

MS. JELTE: Yeah. I think the way he addressed it was by dismissing it.

MR. JOHNSON: And the only other thing is do I have to pay back alimony when she's still drawing from my 401-K? It all ought to be the same, because my 401-K stops back in March.

MS. JELTE: Uh-huh.

MR. JOHNSON: Or else my alimony should start from the day the decree is signed.

MS. JELTE: Okay, wait. Say it again.

MR. JOHNSON: She's still taking that -- she'll still get money out of my 401-K; it's $500 a month.

MS. JELTE: Uh-huh.

MR. JOHNSON: That should go back to March. She'll be able to quit then, and I'll owe back alimony or else -- yeah, whatever, start paying alimony from the time the decree is signed.

MS. JELTE: Oh, okay. I apologize. I haven't looked at your file, and so I'm not real up to speed on what the issues are. I plan on doing that over the weekend, starting with first looking at the transcript and then going to the objection and then looking back at the other notes and so on. So I'm going to have to get up to speed on it before I do anything else. Are you going to be going to Richfield?

MR. JOHNSON: For the Court date?

MS. JELTE: Uh-huh.

MR. JOHNSON: Yeah.

MS. JELTE: Okay, because between now and then we'll probably need to talk probably once -- once more about what the issues are and what position you want to take and so on. So -- but I probably won't give you a call back until Sunday when I get into it a little bit more.

MR. JOHNSON: Okay.

MS. JELTE: I'm not going to spend that much time with it tonight other than to maybe glance at the transcript.

MR. JOHNSON: Okay.

MS. JELTE: I hope you're feeling better.

MR. JOHNSON: It's just the same. It doesn't ever

change.

MS. JELTE: Well, you get to see Caden. That's good.

MR. JOHNSON: Yeah, but do I want to see Caden?

MS. JELTE: Sure, you do.

MR. JOHNSON: I'm pretty much writing him off.

MS. JELTE: Why is that?

MR. JOHNSON: It's not worth it. It's not worth it every time I want to see him to have to go to Court or deal with attorneys to see him.

MS. JELTE: When was the last time you saw him?

MR. JOHNSON: July, 1st of July. So if she wants me miserable that's fine, but Caden -- yeah, he'll get his child support, but he's not getting any inheritance and he's not getting a dad. That's that. I've had it. I'm totally out of this whole situation.

MS. JELTE: Well, I don't think that that's the best way to handle your son. He cares about you a lot, and I think that you're a better dad than that. I know you're frustrated, but I think it will pass and I think you'll get on with your life and things will get better.

MR. JOHNSON: But one thing about it, when he gets older he can ask questions why, and I'll tell him then, but I -- you know, I'm not -- I've had it.

MS. JELTE: What about your other son? Have you seen him lately?

MR. JOHNSON: Oh, I talk to him quite often. So yep, I think the Court system in Utah is screwed up.

MS. JELTE: I know you feel that way right now, but it will -- I think --

MR. JOHNSON: You can't tell me in 20 years I'm going to feel it's right. I lost $200,000 and she made a profit. You can't tell me I'll think better about it in 20 years.

MS. JELTE: No, I was saying you'd think -- I think you need to wait and let us get through the emotions and everything. I think right now you're --

MR. JOHNSON: The Judge hasn't ruled in on one thing to help me not one time, not either Judge. So no, I'm never going to come around.

MS. JELTE: Well, I think Mower tries to do a good job, and --

MR. JOHNSON: He's a slime ball. He's a liar and he's unethical, and he's going to have what's coming to him.

MS. JELTE: I think --

MR. JOHNSON: All of the Mowers -- yeah, he's a hypocrite. He doesn't follow the law. He's the Judge. He doesn't follow the law.

MS. JELTE: I think that when you -- you need to reserve judgment until we get through this next hearing.

MR. JOHNSON: Well, we'll see, but I'm -- it's not going to change. I think Lyman is a piece of shit.

MS. JELTE: I know it would have helped if he had heard your motion about the debts before you finally couldn't take it anymore and filed bankruptcy. I know that would have helped, but I -- that Judge, too, Lyman, I think, tries to --

MR. JOHNSON: How can the Judge sit there and think, okay, you have a hundred and some thousand dollars income, and you take half the income away and give the guy all the bills and have him pay it all and think, well, it's going to be rosy, and that go a year? Oh, but give her all the assets in the meantime. You know what? Fair and equitable, did that come into play at any time? I don't think so. No.

MS. JELTE: Well, you still have the right to appeal, and that --

MR. JOHNSON: Yeah, but what good is that going to do?

MS. JELTE: That's --

MR. JOHNSON: Really. It's in Utah.

MS. JELTE: -- 20 days from the date that the decree is finally signed.

MR. JOHNSON: I think, you know what, the better way -- I have no faith in the Court system. I have no faith in it at all. The only way it's ever going to be fair is when people make it fair.

MS. JELTE: Well --

MR. JOHNSON: They go by the same principles everybody else is playing by. Does Neeley play by the rules? No. Does

the Court system play by the rules? Is the Court system fair? Do they follow the law? No, they don't. You've got Lyman signing -- I'm not even represented, and he's signing bills. He's not following the law on judgments he's making. He's not following the law. So how can he expect people to follow the law if he refuses? It's not going to happen.

MS. JELTE: Well, I think if you go back to that first hearing, I think you've forgotten about what she was testifying to about how she thought that the bills were generated because -- from debt that you had acquired and that had been rolled over. That's where Lyman was coming from.

MR. JOHNSON: And so it's safe to say that the Court thinks that she should live in a house rent free, be able to pocket all the cash she wants and live rent free, free of any obligations for two years and be fine. She has no obligation. She wasn't paying for the house. The Court system is screwed.

MS. JELTE: I think Judge Lyman --

MR. JOHNSON: He's an asshole.

MS. JELTE: Well, I think one of the reasons he got off the case had to do with concerns about that ex parte protective order and having Judge Mower hear it to have somebody fresh and anew to try to resolve the case. I think Mower tried. I think he missed some points, and that's what the hearing on Monday is about. is to try to get him to try to close up those holes in your case and get that resolved.

MR. JOHNSON: But the end judgment is not going to change. I'm still screwed.

MS. JELTE: I think if you can just -- let's get through this hearing. I think you'll feel better, and I think you'll feel a lot better and things will --

MR. JOHNSON: Well --

MS. JELTE: If you just give it some time and distance. Then if you want to pursue your appeal, fine, but --

MR. JOHNSON: Maybe I'll appeal it, maybe I won't, but I don't have any faith in the legal system. I can handle it by myself, because you know what? Yeah, there's too much corruption. I've seen all -- I've seen firsthand the corruption in Sevier County, and you know what? I'm not going to take it no more. After one, the rest are free.

MS. JELTE: I'm sorry, what did you say?

MR. JOHNSON: After one, the rest are free.

MS. JELTE: Oh.

MR. JOHNSON: I've had it. This has went as bad as it could --

(Tape cuts out and then starts again)

MS. JELTE: But your parents --

MR. JOHNSON: And they can put me in jail. You know what? They can put me in jail for 60 days. They can put me in jail for a year, and all it's going to do is piss me off more. They can take away my guns, and all it's going to do is piss me

off more. I've had it. It's injust, it's corrupt, and you know what? The legal system is so injust and corrupt, that I'm going to take care of it by myself. That's all there is to it.

MS. JELTE: I think you need to be thinking about both of your children, and I think --

MR. JOHNSON: I'm not -- I don't even plan on seeing both of my children anymore. I was a damn good dad, but this stage in the game, you know what? That's not even -- I don't -- you know what? It doesn't even matter.

MS. JELTE: Jeff, are you suicidal right now?

MR. JOHNSON: Only after I take out a bunch of people with me. I'm not going to go by myself. I can guarantee it.

MS. JELTE: Well, you've got two really wonderful parents who love you dearly.

MR. JOHNSON: And that's not the problem.

MS. JELTE: No.

MR. JOHNSON: The problem is the damn system. The problem is, she makes a profit and I go bust. The problem is my first attorney before I talked to you said, "Lyman has already judged on you because of the shit that Dale Eyre told him." You know what? Dale Eyre and the Judge are not even supposed to talk about me.

MS. JELTE: You've got two beautiful children.

MR. JOHNSON: And I wrote them both off.

MS. JELTE: And you've got two wonderful parents, and

you need to think about how your decisions will affect those people.

MR. JOHNSON: And you know what? If 20 years ago, if 5 years ago, if 10 years ago men would stand up and say, "You know what? I'm tired of being screwed by Utah," and take action on their own, maybe somebody would say, "You know what? Maybe this isn't right. We're getting Judges knocked off left and right. Maybe this isn't right."

MS. JELTE: It's called working with your Legislature and working --

MR. JOHNSON: No, the law is just. When the Legislature says "fair and equitable," when they write a protective order and said if the person is attacked and they attack back in self-defense, if they do something in self-defense then it shouldn't be held to a protective order. Then you look at Judge Lyman who says, "Oh, yeah, it's fine for somebody to attack in self-defense, and if you respond back then it's malicious," he's not following the Legislature. Fair and equitable, I don't think anywhere in my case is fair and equitable.

MS. JELTE: That's when you take it up on appeal.

MR. JOHNSON: No, that's -- by -- you know what? So I can spend 40 more thousand dollars and get it stuck up my ass again. No.

MS. JELTE: The problem is is that what -- if you -- from -- if you --

MR. JOHNSON: The only problem is, I don't care. If I can get four or five people in Sanpete and Sevier County and they take me out, it's a better world, isn't it?

MS. JELTE: No, hon, that's --

MR. JOHNSON: And if I can take out their DNA offspring, it's even better.

MS. JELTE: Hon, that's not the way you solve the problem.

MR. JOHNSON: It is at this point.

MS. JELTE: No, because then all you're going to do is break your parents' heart and devastate your children, and your children will be -- have this legacy that is horrible for them to face. You're too good a man for that. You're upset right now.

MR. JOHNSON: No, I've been upset for years. I'm past upset. I want justice.

MS. JELTE: Jeff, ever since I've met you you've been a real concerned dad about your children and what you wanted for them.

MR. JOHNSON: It's past that. It's past that. The State of Utah doesn't give a shit about my kids. The -- you know what? Judge Lyman didn't give a fuck if I starved Jordan to death when I had him. He didn't care about kids.

MS. JELTE: You would break your parents' heart and your children, and you know that.

MR. JOHNSON: But if the world's a better place after I

leave, you know what? That's all that matters, right?

MS. JELTE: I don't know what you're planning, hon, but I just -- I want you not to do whatever it is you're thinking about, and I'm serious.

MR. JOHNSON: You know what? I told my buddy about it. I've got a pretty close friend, and he told me -- he said, "You know what, you're not going to get caught, but you're going to go to hell." It's worth it.

MS. JELTE: I wish your friend had told you to -- not to do whatever it is you're talking about doing. It doesn't sound like much of a friend to me.

MR. JOHNSON: It's just you know what? You've got the make the world a better place.

MS. JELTE: That's not making the world a better place.

MR. JOHNSON: Of course it is. You know what? Once a Judge gets on the bench, they're held -- they don't have any accountability. You know what? If being an attorney is how bad you can screw somebody, and work outside the law and sit up there and lie, you know what? There's no accountability there.

(Tape cuts out and then starts again)

MR. JOHNSON: Guess what?

MS. JELTE: Who's your friend that --

MR. JOHNSON: I'm that somebody.

MS. JELTE: Who's your friend that's encouraging you to be stupid?

MR. JOHNSON: No, he's not encouraging me. He's telling me I'm going to hell; but it's a damn good plan, so you know what?

MS. JELTE: Who are you talking about?

MR. JOHNSON: Nobody. Nobody else needs to be in this. Neeley is an asshole. You know what? To this day if he wouldn't have took the steps that he took, I'm sure me and the ex could have got back together.

MS. JELTE: I don't know that Corrinne --

MR. JOHNSON: You know what, me --

MS. JELTE: I don't know that Corrinne was asking him for advice on whether to reconcile. I think he was pretty shocked that you guys were trying to reconcile.

MR. JOHNSON: Well, you know what? I don't really care. I know he distorted the facts. I know he's an asshole. I know he's had multiple affairs. So you know what? He's an asshole. If he's going to screw me for everything he can, for money, legal or not, you know, he'll do whatever he can, then he should anticipate me screwing him for every way I can, legal or not. If he has no ethics, he shouldn't expect people he's screwing to have ethics. You know, that's the bottom line.

MS. JELTE: So --

MR. JOHNSON: He took away my kids. I'll take away his kids.

MS. JELTE: So what are you planning on doing, kiddo?

MR. JOHNSON: I don't think I'll tell you, you know. It won't benefit you, and I know it won't benefit me if I tell you.

MS. JELTE: Well, I know one thing. You -- I don't -- it doesn't matter what you're talking about doing or what you're thinking about doing. You need to just not do it, and you need to -- if you need to sit down with a counselor or somebody and talk to them about how angry and upset you are --

MR. JOHNSON: Is that going to give me my $300,000 back? I don't think so. Is that going to make Neeley a better person? I don't think so.

MS. JELTE: But who cares about how Neeley is or who he is or what he does in the future?

MR. JOHNSON: It's called justice. Why should I continue to sit idly by and let him fuck people over, to let him do it to somebody else. I know with you it's -- you know, it's the job, it's the game; but with people involved it's not.

MS. JELTE: I don't think that --

MR. JOHNSON: Okay. If Neeley writes me a check for $150,000, I'll call it even with him.

MS. JELTE: And what does the Judge have to do?

MR. JOHNSON: Well, if he -- let's see, the Judge. I think Sevier County Judge Mower, he's the one that signed the protective order for her to go remove everything except for my personal shaving articles, and steel. He won't give them back. So I think he can make up for that.

MS. JELTE: And what about Judge Lyman?

MR. JOHNSON: I don't know. If Neeley gives me the 150 grand, I guess we'll be even, won't we?

MS. JELTE: Well, Jeff --

MR. JOHNSON: But I don't see that happening.

MS. JELTE: No, it's not going to happen.

MR. JOHNSON: It's not going to happen. So there's just life, liberty and justice for all.

MS. JELTE: You said the other day something that really scared me, Jeff. You said that you -- that Doug Neeley's life would end. Now, I don't know what you're planning, but it can't involve ending anybody's life. You know that.

MR. JOHNSON: So when you go into Court and you take everybody's everything, and you lie to do it, you know, I don't know. He doesn't care what happens to my life. He'll lie, he'll do anything to get to those ends.

MS. JELTE: I -- remember he's --

MR. JOHNSON: I'm tired of being fucked with. I'm tired of it.

MS. JELTE: I think you're just -- I think you're just upset right now, and I think that -- I'm going to check on you tomorrow or --

MR. JOHNSON: Joy --

MS. JELTE: -- either tomorrow or the next day.

MR. JOHNSON: Joy, I'm not suicidal.

MS. JELTE: Pardon me?

MR. JOHNSON: I am not suicidal. Justice. It's not suicide. It's justice.

MS. JELTE: I really am worried about you.

MR. JOHNSON: Well, you know what, maybe people ought to follow the law.

MS. JELTE: I'd like to see you --

MR. JOHNSON: You know, in the whole Court situation maybe the Judge ought to consider, "Maybe I should follow the law."

MS. JELTE: And so what are you --

MR. JOHNSON: That's not going to happen.

MS. JELTE: -- going to do?

MR. JOHNSON: Go out with a bang.

MS. JELTE: No, you're not going to do that. Look --

MR. JOHNSON: No. No, actually, I plan on -- just justice, Joy.

MS. JELTE: Look --

MR. JOHNSON: Because the time they catch up with me, after one, the rest are free. Yep, I'll make my mark.

MS. JELTE: No, hon, you're not going to do that. You're going to -- you're just going to take a deep breath, and you're going to go talk to somebody about it, and you're going to go and see if you can just get clear headed so that you don't do something stupid.

MR. JOHNSON: I have counseling for free, Joy.

MS. JELTE: Well, then go.

MR. JOHNSON: Why? They're not going to get my money back. You know what? I know what's right. I know what's just. It just seems like everybody else has no idea.

MS. JELTE: I know that whatever -- if you -- you know, if you -- the other day you were talking about hurting Doug and you were talking about hurting the Judge, and you were talking about hurting -- taking away property and family and so on. That is -- all you're talking about is destruction. So how is that justice? It's not.

MR. JOHNSON: Okay. When somebody takes away all my property, my family, everything I've worked for, $200,000, totally destroying me, what are they talking about?

MS. JELTE: Well --

MR. JOHNSON: And they don't follow the law to do it.

MS. JELTE: You haven't pursued every avenue of appeal.

MR. JOHNSON: Joy, how many hundreds of thousands of dollars can I afford in attorney fee -- fees, which I'll never gain back. I'll never gain back. For what? How many hundreds of thousand dollars is it worth living my life hell to get back justice which they'll never pay the price for. There is no accountability on the other side. There's not.

MS. JELTE: And so you do something destructive, and you ruin your life and you ruin your kids' lives and you ruin your

parents' lives and --

MR. JOHNSON: Well, you know what? You know what? At the end of the day, the people that are doing the same thing, they won't do it no more.

MS. JELTE: The only --

MR. JOHNSON: This isn't something I just conjured up.

MS. JELTE: I --

MR. JOHNSON: I mean, I've been thinking about this since I've been living in Utah. I mean, it was good to move to New Mexico. I'm damn glad I did, but it's just -- you know what? What's right is right.

MS. JELTE: Your -- Jeff, as far as I can tell, none of us have the moral right to pass judgment on another human being.

MR. JOHNSON: But they have, haven't they?

MS. JELTE: You can get on with your life. If you do something that ends the life of another person, you disrupt so much, not just your life, but their life and the people that love them --

MR. JOHNSON: Boy, I'd hate to disrupt their life.

MS. JELTE: -- and the people that love you and are concerned about you and care about you.

MR. JOHNSON: And I'm sure that all that consideration went into the judgments and into Court, didn't it? They was really concerned about how bad they destroyed me, wasn't they? I'm sure it just tore them up.

MS. JELTE: You don't think your parents aren't concerned?

MR. JOHNSON: It has nothing to do with my parents. I don't think my parents made judgments. I don't think my parents got up on the stand and lied, deceived, twisted stories to -- you know. It has nothing to do with my parents. It has to do with Neeley, two Judges, and Dale Eyre.

MS. JELTE: Well, Dale Eyre hasn't been involved in --

MR. JOHNSON: Yes, he has.

MS. JELTE: -- your case in the last --

MR. JOHNSON: Yes, he has.

MS. JELTE: -- two years. What makes you think that he's been involved?

MR. JOHNSON: Because Dale Eyre was talking to Judge Lyman, and the first attorney that was related to Judge McIff told me that.

MS. JELTE: Oh. Hon, I'm worried about you. I just want you to just --

MR. JOHNSON: There's no need to worry, Joy. My mind is made up. I'm not suicidal. I'm not. I have a really good life down here. I have fun all the time, you know. It's just you know what? There will be justice.

MS. JELTE: Yeah, there will be justice --

MR. JOHNSON: There will.

MS. JELTE: -- you'll get caught.

MR. JOHNSON: Well, you know what? If I can get four or five and they catch me, so what? I'm still ahead.

MS. JELTE: No, you're not ahead.

MR. JOHNSON: Yeah, I am.

MS. JELTE: No. Hon, look, I want you to just go talk to a counselor, okay?

MR. JOHNSON: No. They're not going to give me back $200,000. Neeley is not going to give me back the money he screwed from me. The Judge sure as hell is not going to give me any money back. No. The day will come, and it won't be for awhile. The day will come there will be justice, and the world will be a better place.

MS. JELTE: Well, as your attorney and your friend, I'm not going to give up on you. We're going to be talking about this hearing coming up Monday. I'm going to be talking with you and checking with you this weekend, because I just think you're just down right now. It may not feel like you're down, but I think --

MR. JOHNSON: I've been down --

MS. JELTE: -- you're just depressed.

MR. JOHNSON: -- for three years.

MS. JELTE: Well, what --

MR. JOHNSON: I'm not depressed, Joy. I mean, after I get off the phone with you, it's Friday night, I'll go out and have fun. I've got things set up for tonight. I mean, I have a

good life.

MS. JELTE: Well, then don't blow it.

MR. JOHNSON: Why?

MS. JELTE: Because --

MR. JOHNSON: There's no justice. There still has to be justice.

MS. JELTE: Because --

MR. JOHNSON: There's none in Utah.

MS. JELTE: But you're not -- no -- you're not the person who should go around administering justice.

MR. JOHNSON: Then who is that --

MS. JELTE: I'm not the person --

MR. JOHNSON: Who is that person? Is it Judges that can't follow the law? Is that the person that's supposed to be assigning justice?

MS. JELTE: Yeah, but you're talking --

MR. JOHNSON: Judges that refuse to follow the law?

MS. JELTE: You're talking about taking action to hurt somebody else.

MR. JOHNSON: Did somebody take action against me to hurt me; yes or no?

MS. JELTE: We don't live out in a -- we may live out in the west, but we don't act like it. We don't carry guns, we don't kill people, we don't harm property, and you know that.

MR. JOHNSON: You'd be surprised what people can live

through and survive.

MS. JELTE: Well, I know people can live through just about anything and survive, and so can you.

MR. JOHNSON: And so can they. It's an equal playing field, you know. What's fair for the goose is good for the gander. I'll play by their rules. I'm not -- I don't have a problem with that. If they refuse to follow the law, so be it.

MS. JELTE: I think you'll feel better after this hearing.

MR. JOHNSON: You know what? I doubt it. I'm not getting dressed up for this hearing, either. I'm coming in a T-shirt and Levis.

MS. JELTE: Well, just leave your guns at home.

MR. JOHNSON: Joy, you know what? I have 11 people on my crew. We deal with life and death every single day. I'm not stupid.

MS. JELTE: I know you're not stupid, but you're talking stupid right now.

MR. JOHNSON: No, I'm talking justice. I'm talking principle. There's a difference. This isn't me -- you know, what's just is just.

MS. JELTE: I'm disappointed in you. I think you know better.

MR. JOHNSON: But all that said, you know what? If I leave it alone, things are just going to go on as usual. It's

just going to keep happening to somebody else. Judges refuse to follow the law, and attorney -- yep. You know what? It's got to end sometime.

MS. JELTE: Look, I'm not going to get in an argument with you about this. I just think that you're just not thinking clearly, and I think you'll feel better after the next hearing, and I want you to snap out of it.

I'm sincere as your friend, as your lawyer, as a friend to your parents, as a friend even to your kids, I really want you to snap out of it, Jeff. You know better.

MR. JOHNSON: Well, I don't have anything planned in the near future.

(Tape cuts out. No further proceedings on tape.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

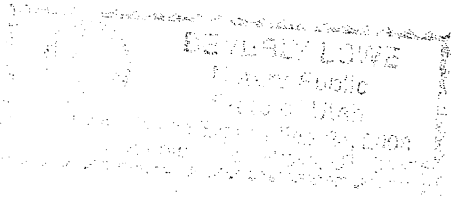
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 14th day of September 2006.

My commission expires:
February 24, 2008

Beverly Lowe
NOTARY PUBLIC
Residing in Utah County



GOVERNING STATUTE AND RULE

Utah Code Ann. § 76-8-316

(1) A person is guilty of a third degree felony if the person threatens to assault, kidnap, or murder a judge or a member of the Board of Pardons and Parole with the intent to impede, intimidate, or interfere with the judge or member of the board while engaged in the performance of the judge's or member's official duties or with the intent to retaliate against the judge or member on account of the performance of those official duties.

(2) A person is guilty of a second degree felony if the person commits an assault on a judge or a member of the Board of Pardons and Parole with the intent to impede, intimidate, or interfere with the judge or member of the board while engaged in the performance of the judge's or member's official duties, or with the intent to retaliate against the judge or member on account of the performance of those official duties.

(3) A person is guilty of a first degree felony if the person commits aggravated assault or attempted murder on a judge or a member of the Board of Pardons and Parole with the purpose to impede, intimidate, or interfere with the judge or member of the board while engaged in the performance of the judge's or member's official duties or with the purpose to retaliate against the judge or member on account of the performance of those official duties.

(4) As used in this section:

(a) "Immediate family" means parents, spouse, surviving spouse, children, and siblings of the officer.

(b) "Judge" means judges of all courts of record and courts not of record.

(c) "Judge or member" includes the members of the judge's or member's immediate family.

(d) "Member of the Board of Pardons and Parole" means appointed members of the board.

(5) A member of the Board of Pardons and Parole is an executive officer for purposes of Subsection 76-5-202(1)(k).

Utah Rule of Evidence 504

(a) Definitions. As used in this rule:

(1) A "client" is a person, including a public officer, or

corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in a rendition of professional legal services.

(4) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or one specifically authorized to communicate with the lawyer concerning a legal matter.

(5) A "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client and the client's representatives to the lawyer or the lawyer's representative incidental to the professional relationship.

(6) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, in any combination.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, the

client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication is presumed to have authority to claim the privilege on behalf of the client.

(d) Exceptions. No privilege exists under this rule:

(1) Furtherance of Crime or Fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants Through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or

(4) Document Attested by Lawyer. As to a communication relevant to an issue concerning a document to which the lawyer is an attesting witness; or

(5) Joint Clients. As to a communication relevant to a matter of common interest

between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.